



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 8, 1995

Mr. Pat Cain  
Assistant Attorney General  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR95-247

Dear Mr. Cain:

We have been asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The request was assigned ID# 28468.

On August 12, 1994, the Office of the Attorney General (the "OAG") received an open records request from an individual for all records pertaining to his dismissal from dental school. Specifically, the requestor seeks

1. True, correct and complete copies of any and all investigative records, reports, statements and letters pertaining to the incident [that] occurred on January 6, 1993 and grievance, by me, that followed.
2. True and complete copies of any and all records, reports, recommendations and letters and memoranda pertaining to the notice of my dismissal from dental school and the dismissal itself.

Certain records that the OAG possesses as a result of its representation of the University of Texas Health Science Center of Houston (the "university") in a legal action brought by the requestor have been submitted to the Open Government Section, specifically: notes and memoranda of university personnel regarding the student, a "Student Guide to Academic Studies," the requestor's academic file, the university police department file regarding an incident involving the student, and various notes and correspondence the OAG received during the course of its representation of the university. We are asked whether these documents are excepted from public disclosure by sections 552.103, 552.107, and 552.111 of the Government Code.

We note at the outset that the above quoted open records request represents the third time the requestor has sought this information. An attorney representing the requestor first sought these records from the university and the OAG in a letter dated May 13, 1994. The same attorney requested these records from the OAG a second time on June 10, 1994. Both of these open records requests were summarily denied without either the university or the OAG making a request to this office for an open records decision.<sup>1</sup> Consequently, both the university and the OAG failed to request open records decisions within ten days of receipt of those two requests. See Gov't Code § 552.301(a); see also Open Records Decision No. 511 (1988) (attorney for governmental body may not withhold information pursuant to "litigation" exception without first requesting open records decision from attorney general). It was only upon the requestor's third attempt to obtain these records from the OAG that a decision was sought from the Open Government Section regarding these records.

Section 552.301(a) of the Government Code requires a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). In order to overcome this presumption, there must exist "compelling reasons" for withholding the information. See *Hancock*, 797 S.W.2d at 381.

We have not been presented with compelling reasons why the information at issue should not be released. See, e.g., Open Records Decision No. 630 (1994) (mere fact that information may come within attorney-client privilege does not constitute "compelling" reason for withholding information where ten day deadline is not met). We note, however, that the fact that information is deemed confidential by statutory law constitutes a compelling reason for withholding the information. Open Records Decision No. 150 (1977) at 2. Some of the information at issue pertains to university students other than the requestor and as such constitute "education records" excepted from public disclosure under section 552.026 of the Government Code:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

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<sup>1</sup>We note that a state agency's request for legal assistance from an assistant attorney general who is representing the agency in a legal action does not constitute a request for an open records decision under section 552.301 of the Government Code. Cf. Open Records Decision No. 412 (1984) (state agency's request for legal opinion from assistant attorney general does not constitute request for "attorney general opinion" under former V.T.C.S. art. 4399).

The Family Educational Rights and Privacy Act of 1974 (FERPA) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of postsecondary education, the student holds the rights accorded by the United States Congress to inspect these records. *Id.* § 1232g(d). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

For purposes of FERPA, some of the records at issue constitute "education records" of students other than the requestor to the extent that they contain identifying information about those students. However, education records must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982) at 3; 206 (1978) at 2. We have marked the portions of these documents that must be withheld pursuant to FERPA in order to protect the identity of particular students. However, the remaining portions of these records must be released to the requestor as well as all of the other requested records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/RWP/rho

Ref.: ID# 28468

Enclosures: Marked documents

cc: Mr. Ali R. Jafarzadeh  
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(w/o enclosures)